No. 05-409

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IN THE

Supreme Court of the United States

CARL KIRCHER, *et al.*,
Petitioners,

v.

PUTNAM FUNDS TRUST, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

On January 6, 2006, this Court granted the petition for a writ of certiorari in this case, limited to Question 1 of the petition:

Whether the court of appeals had jurisdiction, contrary to the holdings of three other circuits, to review a district court order remanding for lack of subject-matter jurisdiction a suit removed under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), notwithstanding 28 U.S.C. § 1447(d)'s bar on appellate review of remand orders based on lack of subject matter jurisdiction and the district courts' conclusion that petitioners' claims are not preempted by and thus not removable under SLUSA.

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INTEREST OF AMICUS CURIAE

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. To that end, WLF has appeared before this and other federal and state courts in numerous cases raising issues relating to the proper scope of the federal securities laws. *See, e.g., Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005); *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F. 3d 134 (2d Cir. 2003); *In re Silicon Graphics Inc. Secs. Litig.*, 183 F.3d 970 (9th Cir. 1999); *Diamond Multimedia Sys. v. Superior Court*, 19 Cal. 4th 1036 (1999), *cert. denied*, 527 U.S. 1003 (2000).

WLF is concerned that if the decision below is reversed, the result will be the frustration of Congress' express intention, as embodied in two important pieces of legislation in the 1990s, that lawsuits involving nationally traded securities be decided by federal courts. WLF has no financial interest in the outcome of this lawsuit.

SUMMARY OF ARGUMENT

Appellate review of remand orders under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") is not only required by the text and structure of that statute, but is also a necessary concomitant of SLUSA's fundamental purpose. In 1998, Congress enacted SLUSA in response to a growing wave of securities litigation filed in state court. Three years earlier, Congress had adopted the Private Securities Litigation Reform Act

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than amicus and its counsel, contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of this amicus brief; pursuant to Supreme Court Rule 37.3, letters evidencing this consent have been lodged with the Clerk.

of 1995 (the "Reform Act") to curb abusive securities litigation. Among other reforms, the Reform Act significantly heightened the standards for pleading federal securities class actions, provided for a stay of all discovery prior to a federal district court order establishing the sufficiency of the complaint, and established a safe harbor for forward-looking statements. In response to these reforms, plaintiffs began filing securities class actions in state courts in record numbers. SLUSA was intended to close the door on this circumvention by preempting state class actions and making federal court the *exclusive forum* for the vast majority of securities class actions.[2]

Petitioners' position is that while federal district courts are authorized to determine the preemptive scope of SLUSA,[3] federal courts of appeal are not authorized to review the remand orders of district courts, even if those remand orders clearly misapply the law.[4] The Court's recent decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. __ (2006), makes it clear that the district court's decision to remand this case was erroneous. Petitioners' argument that the district court's erroneous determination is non-reviewable because it is "jurisdictional" misconstrues both 28 U.S.C. § 1447(c)-(d) and the Court's

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[2] *See* H.R. Rep. 105-803, at 15 (Oct. 9, 1998) ("The solution to this problem is to make Federal court the *exclusive venue* for most securities fraud class action litigation involving nationally traded securities."); *Bachman v. A.G. Edwards*, No. 4:05 CV 0770 ERW, 2005 U.S. Dist. LEXIS 35684, at *7 (E.D. Mo. 2005) ("In general, SLUSA has made federal courts the *exclusive fora* for most class actions involving the purchase and sale of securities.") (internal citation and quotation omitted). All emphases in quotations in this brief have been added, unless otherwise noted.

[3] *See* Pet. Brief, 38 n.45 ("In every case removed under SLUSA, a federal court determines the 'validity' of the argument that the claims are preempted; that determination dictates whether the case was properly removed and subject to dismissal or improperly removed and subject to remand.").

[4] *See id.* at 25 ("That prohibition on appellate review applies irrespective of the correctness of the district court's conclusion . . . .").

jurisprudence clarifying the meaning of "subject-matter jurisdiction."[5]

To the extent the Court chooses to reach the merits of this appeal rather than dismiss it on mootness grounds in light of *Dabit*, this amicus brief seeks to emphasize the practical consequences of foreclosing appellate review over SLUSA remand orders. If the Court does not allow review of SLUSA remand orders of "covered class actions,"[6] it will undermine the fundamental policies underlying SLUSA – to prevent the circumvention of the Reform Act; to provide businesses with a uniform standard of liability; to promote predictability, certainty and efficiency in the interpretation and application of the securities laws; and to eliminate improper forum-shopping. The legislative history of SLUSA establishes that these were Congress' primary goals in enacting the statute, and *all* of these goals will be substantially impeded by denying appellate review of SLUSA remand orders.

ARGUMENT

I. IN ENACTING SLUSA, CONGRESS INTENDED TO REIN IN CIRCUMVENTION OF THE 1995 REFORM ACT

The primary purpose of SLUSA was to prevent the circumvention of the Reform Act by plaintiffs filing securities class actions in state court and engaging in improper forum-shopping. The text and overwhelming legislative history of SLUSA are clear regarding that intention.

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[5] *See Arbaugh v. Y & H Corp.*, 546 U.S. ___, 163 L. Ed. 1097, 1107-1111 (2006); *Kircher v. Putnam Inv. Mgmt., LLC*, 373 F.3d 847, 849-51 (7th Cir. 2004); *Kontrick v. Ryan*, 540 U.S. 443, 454-56 (2004); *Scarborough v. Principi*, 541 U.S. 401, 413-14 (2004).

[6] As Judge Easterbrook noted, there is no dispute that this action is a "covered class action," and therefore removal was proper. *Kircher*, 373 F.3d at 849. And, as the Court recently held in *Dabit*, "*all* 'covered class actions' filed in state court are removable" pursuant to SLUSA. 547 U.S. ___ (slip op., at 10 n.7).

In enacting the statute, Congress made the following express factual findings:

> The Congress finds that –
> (1) the Private Securities Litigation Reform Act of 1995 sought to prevent abuses in private securities fraud lawsuits;
> (2) since enactment of that legislation, considerable evidence has been presented to Congress that a number of *securities class action lawsuits have shifted from Federal to State courts*;
> (3) *this shift has prevented that Act from fully achieving its objectives*;
> (4) State securities regulation is of continuing importance, together with Federal regulation of securities, to protect investors and promote strong financial markets; and
> (5) *in order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995, it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities*, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.

Pub. L. No. 105-353, 112 Stat. 3227 (codified at 15 U.S.C. § 78a note; emphasis added).

In its Conference Report which was agreed to by both houses,[7] Congress further expanded upon its intention when it

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[7] A Conference Report acted upon by both Houses is generally regarded as one of the most authoritative indicators of legislative intent. *See generally Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986) ("We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill."); *Commissioner of Internal Revenue v. Acker*, 361 U.S. 87, 94 (1959) (Frankfurter, J., dissenting)

enacted SLUSA: "The purpose of this title is to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court." H.R. Rep. 105-803, at 13 (Oct. 9, 1998). Quoting a study by former Securities and Exchange Commission member Joseph A. Grundfest and Stanford Law School faculty member Michael A. Perino, the Conference Report noted the substantial increase in securities class actions filed in state court following the passage of the Reform Act:

> The evidence presented in this report suggests that the level of class action securities fraud litigation has declined by about a third in federal courts, but that there has been an almost equal increase in the level of state court activity, largely as a result of a "substitution effect" whereby plaintiffs resort to state court to avoid the new, more stringent requirements of federal cases.

Id. at 14 (quoting J. Grundfest & M. Perino, *Securities Litigation Reform: The First Year's Experience: A Statistical and Legal Analysis of Class Action Securities Fraud Litigation under the Private Securities Litigation Reform Act of 1995*, Stanford Law School (Feb. 27, 1997)).[8]

("The most authoritative report is a Conference Report acted upon by both Houses and therefore unequivocally representing the will of both Houses as the joint legislative body.").

[8] *See also id.* at 14 ("Prior to the passage of the Reform Act, there was essentially no significant securities class action litigation in State court. In its Report to the President and the Congress . . . the SEC called the shift of securities fraud from Federal to State court 'potentially the most significant development in securities litigation' since passage of the Reform Act.") & 14-15 ("The managers also determined that, since passage of the Reform Act, plaintiffs' lawyers have sought to circumvent the Act's provisions by exploiting differences between Federal and State laws by filing frivolous and speculative lawsuits in State court, where essentially none of the Reform Act's procedural or substantive protections against abusive suits are available.").

In order to prevent this forum-shopping, SLUSA was enacted to provide a uniform set of standards for securities litigation. *Id.* at 13 ("[T]his legislation establishes *uniform national rules* for securities class action litigation involving our national capital markets.") & 15 ("The solution to this problem is to make Federal court the *exclusive venue* for most securities fraud class action litigation involving nationally traded securities.").

This bipartisan concern about forum-shopping was echoed in the statements of many individual legislators. *See, e.g.*, 144 Cong. Rec. S4813 (statement of Sen. Domenici) (May 13, 1998) ("The bill will keep plaintiffs' lawyers from picking State courts to do what . . . we know they are already doing – they look for a sympathetic state forum where they can get these lawsuits filed."); 144 Cong. Rec. S4809 (statement of Sen. D'Amato) (May 13, 1998) ("this bill . . . will stop the strike action suits, the forum shopping that we have attempted to limit"); 144 Cong. Rec. S4797 (statement of Sen. Feinstein) (May 13, 1998) ("Further, this legislation would prevent 'forum shopping,' a method for nuisance lawsuits to be initiated in the most sympathetic state jurisdiction."); 144 Cong. Rec. H10,781 (statement of Rep. Cox) (Oct. 13, 1998) ("To address this inequity and assert that national markets require nationally applied rules, this legislation will make federal courts the exclusive venue for large-scale securities fraud lawsuits involving securities subject to federal regulation under the 1996 National Markets Act.").

Congress also emphasized that a uniform set of standards would create a *certain, predictable* business environment. *See* 144 Cong. Rec. S4813 (statement of Sen. Boxer) (May 13, 1998) ("We, as policymakers, must establish a regulatory environment in which . . . the high-growth industries of our economy . . . are provided *the stability and certainty they need to expand, grow, and create jobs.*"); 144 Cong. Rec. S4806 (statement of Sen. Dodd) (May 13, 1998) ("What is before us is whether or not we are going to have one standard here so that we can try to have some *predictability* and a little fairness in this process."); 144 Cong. Rec. S4802 (statement of Sen. Kerry) (May 13, 1998) ("Moving all class action securities lawsuits to federal court should lead to

the creation of a more *favorable, stable climate for businesses* . . . .").

Uniformity also was viewed by Congress as essential for the proper functioning of an efficient national securities market:

> It simply makes no sense to open those who make statements about national securities on a national basis to class actions brought under 50 separate State regulatory regimes – not if we want efficient and well-functioning securities markets, that is. In short, *not only is a uniform standard appropriate in this case; it provides perhaps the quintessential example of something that should be subject to one set of standards nationwide.*

144 Cong. Rec. S4799 (statement of Sen. Lieberman) (May 13, 1998); *see also* 144 Cong. Rec. S4800 (statement of Sen. Reed) (May 13, 1998) ("I favor this legislation because it recognizes the national nature of our securities markets, provides for more *efficient capital formation*, and protects investors.").[9]

Finally, Congress intended for SLUSA to be given a broad interpretation as to its preemptive scope in order to ensure that its remedial purposes were effectuated:

> [W]hile the Committee believes that it has effectively reached those actions that could be used to circumvent the reforms enacted by Congress in 1995 as part of the Private Securities Litigation Reform Act, *it remains the Committee's intent that the bill be interpreted broadly* to reach mass actions and all other procedural devices that might be used to circumvent the class action definition.

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[9] *Cf. Dabit*, 547 U.S. ___ (slip op., at 5) ("The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated.").

S. Rep. 105-182, at 8 (May 1998) (Committee Report by the Senate Committee on Banking, Housing, and Urban Affairs).

II. DENYING APPELLATE REVIEW OF SLUSA REMAND ORDERS WILL FRUSTRATE CONGRESS' PRIMARY PURPOSES IN ENACTING SLUSA

The essential policies embodied in SLUSA will be substantially eroded if the Court reverses the Seventh Circuit's decision. Although Congress intended for SLUSA's preemptive scope to be interpreted broadly, not all district courts have followed that approach. As one district court has observed, "[t]he district court cases appear to be all over the map on the issue of what state law claims are preempted by SLUSA." *Magyery v. Transamerica Financial Advisors, Inc.*, 315 F. Supp. 2d 954, 959 (N.D. Ind. 2004).

Denying appellate review of SLUSA remand orders would compound this problem in at least two fundamental ways. First, if remand orders are non-appealable, the non-uniformity will continue to go unresolved, leading to different interpretations of the breadth of SLUSA's preemptive scope among different circuits and even within circuits. This undermines predictability and certainty for litigants and would promote forum-shopping. Second, prohibiting appeals from remand orders would cut in the opposite direction that Congress intended. Congress intended SLUSA to be interpreted broadly, so that the vast majority of securities litigation would occur in federal court. If remand orders are non-appealable, then erroneously over-narrow interpretations of SLUSA will be non-reviewable. On the other hand, if a federal district court interprets SLUSA too broadly and erroneously refuses to remand a case, such an order would be appealable. This runs counter to one of the fundamental policies of SLUSA, which is to ensure that securities class actions (with a few narrow exceptions) remain exclusively in federal court.[10]

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[10] In effect, under petitioners' interpretation, appellate review under SLUSA only protects *plaintiffs* trying to stay in state court rather than

The need for appellate review of SLUSA remand orders is underscored by the wide diversity in opinions concerning the preemptive scope of SLUSA. While the Court's decision in *Dabit* has resolved one of the substantive issues concerning the scope of SLUSA – i.e., whether SLUSA applies to "holder" claims – there are splits in authority concerning a number of other issues related to the statute's preemptive scope. These include: (a) whether a complaint must allege scienter to be preempted under SLUSA,[11] (b) whether preemption is properly analyzed on a claim-by-claim basis or by looking at the complaint in its entirety,[12] (c) whether

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defendants seeking the protections of federal court. Given Congress' express purpose in enacting SLUSA, it is difficult to imagine that Congress intended such a result. *See* H.R. Rep. 105-803, at 13 (Oct. 9, 1998) ("The purpose of this title is to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court.").

[11] *Compare Burns v. Prudential Secs.*, 116 F. Supp. 2d 917, 923-26 (N.D. Ohio 2000) (plaintiff must allege facts giving rise to a strong inference of scienter for SLUSA preemption to apply); *Simon v. Internet Wire, Inc.*, No. CV 00-13195 CBM (RNBx), 2001 U.S. Dist. LEXIS 4086, at *6-*10 (C.D. Cal. 2001) (same) *with Winne v. Equitable Life Assurance Society*, 315 F. Supp. 2d 404, 413-15 (S.D.N.Y. 2003) (disagreeing with *Burns* and *Simon* and holding that SLUSA has no scienter requirement); *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1346 (11th Cir. 2002) ("... . SLUSA preempts some claims . . . that lack a scienter requirement."). *See also Magyery*, 315 F. Supp. at 959 (N.D. Ind. 2004) ("A careful reading of the cases reveals that many of the differences are based on variations in the facts, but there is a clear split among the courts on the issue of whether the Plaintiffs' claims must allege "scienter" for SLUSA preemption to apply.").

[12] *Compare Gray v. Seaboard Secs., Inc.*, 241 F. Supp. 2d 213, 219 (N.D.N.Y. 2003) ("[T]he fact that SLUSA preempts *some* causes of action in a complaint does not entitle a defendant to broadly invoke federal preemption against the entire complaint.") (emphasis in original), *rev'd in part on other grounds*, 126 Fed. Appx. 14 (2d Cir. 2005) *with Winne*, 315 F. Supp. 2d at 417 (S.D.N.Y. 2003) ("[R]eading the Complaint in its entirety . . . plaintiff's breach of contract claim is really a fraud claim, which must be dismissed under SLUSA . . . ."); *Araujo v. John Hancock Life Ins. Co.*, 206 F. Supp. 2d 377, 384-85 (E.D.N.Y. 2002) (holding that breach of contract and unjust enrichment claims are

the "in connection with" requirement is satisfied only by allegations concerning transactions in particular securities,[13] and (d) whether the alleged misrepresentations must be a "necessary component" of plaintiffs' complaint.[14] Appellate review of

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preempted where a plaintiff generally alleges fraud in connection with the purchase or sale of securities); *Dudek v. Prudential Secs., Inc.*, 295 F.3d 875, 880 (8th Cir. 2002) (preempting all causes of action where "the essence of [the complaint] is the unlawful marketing of [securities] . . . .").

[13] *Compare Abada v. Charles Schwab & Co.*, 127 F. Supp. 2d 1101, 1103 (S.D. Cal. 2000) (where alleged misrepresentations concerned broker's ability to expedite trades and did not relate to any particular securities, SLUSA did not preempt claims); *Shaw v. Charles Schwab & Co.*, 128 F. Supp. 2d 1270, 1274 (C.D. Cal. 2001) (same); *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 01 CIV. 3013 (DLC), 2001 U.S. Dist. LEXIS 15943 (S.D.N.Y. 2001) (alleged misrepresentations about transaction fees "did not concern the value of those securities, or the consideration received in return for trading the securities" and thus SLUSA did not preempt state law claims) *with Gray v. Seaboard Secs., Inc.*, 126 Fed. Appx. 14, 16 (2d Cir. 2005) (SLUSA preempted fraud claims, even though misrepresentations did not relate to particular stocks, where representations related to the source of investment advice and caused plaintiffs to pay commissions "which accrued only upon the purchase or sale of securities"); *McCullagh v. Merrill Lynch & Co.*, No. 01 Civ. 7322 (DAB), 2002 U.S. Dist. LEXIS 3758, at *7-12 (S.D.N.Y. 2002) ("in connection with" requirement was satisfied by allegations that Merrill Lynch's brokerage and investment banking divisions were not independent, even though the complaint did not allege purchase of particular stocks).

[14] *Compare Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 341 F. Supp. 2d 258, 268 (S.D.N.Y. 2004) ("Regardless of the words used by plaintiffs in their complaints and regardless of the labels they paste on each claim, the question is whether a material misstatement or omission in connection with the purchase or sale of a covered security is a *necessary component* of the claim.") (emphasis in original) *with Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 300 (3d Cir. 2005) ("preemption does not turn on whether allegations are characterized as facts or as essential legal elements of a claim, but rather on whether the SLUSA prerequisites are 'alleged' in one form or another"). *See also Gray*, 126 Fed. Appx. at 16 (2d Cir. 2005) (characterizing *Rowinski*'s holding as "SLUSA preempts claims which allege a material

SLUSA remand orders of "covered class actions"[15] will help harmonize the case law, thereby promoting uniformity and predictability while preventing forum-shopping. *See Kircher*, 373 F.3d at 850 ("Appellate review of decisions under § 77p(b) will promote accurate and consistent implementation of that statute, at little cost in delay beyond what the authorized removal itself creates.").

Finally, appellate review of SLUSA remand orders of "covered class actions" is necessary to ensure that defendants in securities fraud cases are not improperly shut out of federal court. As noted by the court below,

> [n]ormal remands, for which § 1447(d) is designed, leave all substantive issues open to plenary resolution in the state court (and, if necessary, the Supreme Court of the United States). That's not how SLUSA works; *it is now or never for appellate review of the question whether an action under state law is preempted.*

Id. Without appellate review, defendants in abusive securities class actions – the very class of persons SLUSA was designed to protect – will have no recourse to challenge improper rulings concerning the scope of SLUSA preemption.

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misrepresentation or omission in connection with the purchase or sale of securities *whether or not that allegation is an element of or otherwise necessary to the putative state claim*").

[15] N.B.: Each of the splits in authority cited above relates to the *substantive* scope of preemption under § 77p(b)(1)-(2), not whether a particular action is a "covered class action."

III. REVIEW OF REMAND ORDERS SHOULD BE VIEWED IN THE CONTEXT OF CONGRESS' INTENT REGARDING SECURITIES CLAIMS

In analyzing the reviewability of remand orders under SLUSA, it is important to focus on the structure and policies of *that* statute. Petitioners argue that § 1447(d)'s general prohibition of appellate review applies "[a]bsent a clear statutory command to the contrary . . . ." Pet. Brief at 28-29 (quoting *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995)). However, the Court's statement in *Things Remembered* was made in a case in which there was "no dispute" that the removal was made on grounds contemplated by § 1447(c). 516 U.S. at 128. Here, where the applicability of § 1447(c) is, at a minimum, disputed (although, in amicus' view, it does not cover the district court's remand order), the Court may infer Congress' intent to allow review of SLUSA remand orders based on the structure and policies of that statute, even without an explicit statutory command.

Similarly, it is inappropriate to rely on Congress' recent *inclusion* of a specific appellate reviewability provision in the Class Action Fairness Act of 2005 ("CAFA") to read the *exclusion* of a similar provision from SLUSA. *See* Pub. L. No. 109-2, 119 Stat. 12 (codified at 28 U.S.C. §1453(c)(1)). Petitioners argue that because CAFA contains such a provision and SLUSA does not, "§ 1447(d)'s prohibition on appellate review applies to district court orders remanding a case for lack of subject-matter jurisdiction under SLUSA." Pet. Brief, 30. But this argument is not supported by CAFA's legislative history. In enacting CAFA, Congress specifically recognized and *chose not to disturb* the framework it established for the adjudication of securities claims in the Reform Act and SLUSA. *See, e.g.*, S. Rep. 109-14, at 49 (Feb. 2005) (Committee Report by the Senate Committee on the Judiciary). Congress included in CAFA a provision providing for the appellate review of remand orders in order "to develop a body of appellate law interpreting the legislation without unduly delaying the litigation of class actions," and noted that § 1447's prohibition on remand order review was added only after "the federal diversity jurisdictional statutes and the related removal statutes had been subject to appellate review for many years and

were the subject of considerable appellate level interpretive law." *Id.* At the same time, Congress specifically provided that CAFA's removal provisions (and the review of removal orders under them) "shall not apply to [federal securities claims] . . . [b]ecause Congress has previously enacted legislation governing the adjudication of these claims, [and] it is the Committee's intent *not to disturb the carefully crafted framework for litigating in this context.*" *Id.* at 49-50. If Congress' intent had been to prevent the federal appellate courts from reviewing remand orders pursuant to SLUSA, it could and would have provided for exactly that, as it has in other contexts. *See, e.g.*, 28 U.S.C. § 1452(c) (specifically prohibiting review of remand orders in cases removed under the federal courts' bankruptcy jurisdiction).

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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